

Statutory Requirement	NLC et al. Proposal	LEC Proposal
Must-carry, sports exclusivity, network non-duplication, syndicated exclusivity, etc. § 653(b)(1)(D), (b)(2)	Application of Part 76 provisions. § 7	Application of Part 76 provisions. §§ 5, 6(e), 7-8
Certification Process § 653(a)(1)		
Access to filings; public notice	Submission in paper and electronic forms. § 4(a)(2) Posting in reference room and on Internet. § 5(a)(1) Notice by electronic mailing list. § 5(a)(2)	FCC to publish notice. § 4(b)
Basic information permitting FCC to process certification	Name(s), form, contact, communities served, date of service, affiliated LECs. § 4(b)(1)(A)-(E)	Name(s), form, responsible partner, contact, communities served, date of service. § 4(c)(1)-(6)
Certification of LEC status	Yes. § 4(b)(1)(F)	
Certification of compliance with FCC rules	Yes. § 4(b)(2)	Yes. § 4(a), (c)(6)
Certification of open access	List of IVPPs. § 4(b)(5) Carriage contracts. § 4(b)(6)	
Certification of compliance with PEG requirements	Yes. § 4(b)(4)	
Certification of compliance with any applicable right-of-way requirements	Yes. § 4(b)(3)	

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FCC processing of certification	Public comment. § 5(b) Notice of facial incompleteness. § 5(c) 10-day time limit. § 5(d)	10-day time limit; FCC inaction deemed approval. § 4(b)
Enforcement § 653(b)(1)		
FCC authority	No OVS without FCC's authorization. § 3(c) Approval subject to continued compliance and review. § 5(e)-(f)	OVS exempted from all FCC rules except as specifically provided. § 3
● Reporting requirements to monitor discrimination	Annual report. § 6	
● FCC investigation	FCC may investigate upon complaint or by own motion. § 14(a)(1) FCC will investigate if <ul style="list-style-type: none"> ● yardstick test not satisfied ● affiliate fails to earn reasonable ROR ● no MFN clause in carriage contract ● inconsistent rates, terms, conditions ● FCC aware of potential violation Operator shall respond to FCC's information requests. § 14(c)	
● Effect of inaction	No right created by inaction. § 14(b)	

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<ul style="list-style-type: none"> • Remedies for violation of FCC regulations 	<ul style="list-style-type: none"> • Decertification, after notice and opportunity to respond (decertified operator must obtain cable franchise). § 14(d)(1) • Fines or forfeitures. § 14(d)(2) • Other lawful remedies. § 14(d)(3) 	
<p>Dispute resolution process § 653(a)(2)</p>	<p>Applies to carriage disputes, not right-of-way issues. § 15(a)(1)-(2), (b)(2)</p> <p>Parties may seek other remedies. § 15(a)(3)</p> <p>Operator has burden of proof. § 15(c)</p> <p>§ 180-day time limit. § 15(e)</p> <p>Service on affected parties. § 15(b)(3)</p>	<p>Applies to VPPs. § 10(a)</p> <p>Operator may require IVPP to submit to ADR prior to FCC action. § 10(b)</p> <p>Complainant shall allege (1) intentionally different treatment, (2) such treatment commercially unreasonable, and (3) actual and substantial harm. § 10(c), (f)(1)(G)</p> <p>180-day time limit. § 10(a)</p> <p>Service on affected parties. § 10(o)</p> <p>Complainant must notify operator and allow at least 10 days to respond. § 10(d)</p> <p>Detailed pleading requirements imposed on complainant. § 10(e)-(i), (l), (n)</p> <p>Documentary evidence or affidavit required with complaint. § 10(f)(1)(H)</p>

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	FCC may award carriage, damages, or both. § 15(f)	<p>Other detailed procedural requirements. § 10(m), (p)-(s)</p> <p>Sanctions for frivolous complaints. § 10(t)</p> <p>One-year statute of limitations. § 10(u)</p> <p>FCC may order appropriate remedies. § 10(v)</p> <p>Operator not liable for damages accruing after 180-day limit. § 10(a)</p>
PEG Access / Title VI § 653(c)(1)(B), (2)(A)		
No greater or lesser than cable operator	<p>"Match or negotiate." §§ 4(b)(4), 12(b)(2), 12(d)</p> <p>LFA to designate rules and procedures for operator use of unused PEG capacity (as Cable Act). § 12(g)</p> <p>No editorial control. § 12(h)</p>	<p>Operator to designate capacity for PEG use. § 6(f)</p> <p>Operator may use unused PEG capacity. § 6(f)(5)</p> <p>No editorial control, except re obscene, indecent, or similar material. § 6(f)(6)</p>
● Types of PEG obligations	Channel capacity, services, facilities, or equipment. § 12(a), (d)	Capacity only. § 6(f)
● Technical facilities to enable access	Special conversions required by system to be provided by operator. § 12(f)	
Consistent with local community needs and interests	LFA sets PEG requirements for each franchise area independently. § 12(a)-(b)(1), (e)(2)	Operator's provision of PEG capacity not subject to regulation by LFA. § 6(f)

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		<p>Operator makes capacity available in manner comparable to that generally in use in franchise area. § 6(f)(2)</p> <p>Operator need not dedicate entire channels to particular entities. § 6(f)(2)</p> <p>Operator to make access available first-come first-served, by lottery, or any other reasonable mechanism. § 6(f)(3)</p>
● Availability to subscribers	PEG channels must be available to all subscribers. § 12(e)(1)	
● Change in obligations	Updated to track cable operator's obligations. § 12(c)	
● Interconnection with cable access channels	<p>On request of LFA. § 12(e)(3).</p> <p>Obligations may be met by added support for existing channels with consent of LFA and cable operator. § 12(e)(4)</p>	
● Establishment of PEG in the absence of an existing cable franchise	By negotiation with LFA. § 12(b)(3)	
Negative option billing	Negative option billing prohibited. § 13(a)	
Fee in lieu of franchise fees	<p>May be required by LFA. § 11(a)</p> <p>Notice of commencement of operation by operator; notice of fee by LFA. § 11(b)</p>	Operator may be subject to fees. § 9(a)

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	<p>Fees on same revenue base and at same rate as any cable operator. § 11(c)-(d)</p> <p>Payment on same basis as cable operator. § 11(e)</p> <p>Operator may designate fees on bills. § 11(f)</p>	<p>Fees not to exceed rate of any cable operator; revenue base specified in regulations. § 9(a)</p> <p>Operator may designate fees on bills. § 9(b)</p>
Cable/OVS Relationship		
	§ 653(a)(1)	
Cable operator as OVS operator	Only where (i) a LEC and (ii) not a franchised cable operator. § 3(b)	
Cable operator as IVPP	In areas where cable operator holds a cable franchise, only with FCC approval. § 8(f)	
Right-of-Way Issues		
	U.S. CONST. amend. V	(§ 653(c)(2)(B))
Effect of Commission approval	Gives LECs no rights in local public rights-of-way. §§ 4(b)(3), 5(e)(2)	Precludes state or local authority from (i) requiring additional authorization or (ii) imposing conditions more burdensome than those imposed on other interstate carriers. § 4(d)
Disputes over right-of-way authority	Question of state and local law. § 15(a)(2), (b)(2)	

Abbreviations:

ADR: alternative dispute resolution
IVPP: independent video programming provider
LEC: local exchange carrier
LFA: local franchising authority
MFN: most favored nation
"Operator": OVS operator (unless otherwise stated)
ROR: rate of return
VPP: video programming provider

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OPEN VIDEO SYSTEMS
(CS Docket No. 96-46)

April 26, 1996

National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida

I. OVS MUST BE MORE THAN CABLE IN DISGUISE

- A LEC can always be a cable operator. Thus, the purpose of OVS is not merely to promote competition, but to provide a new alternative model.
- The Commission is not responsible for ensuring that OVS will succeed in the market, but only for ensuring that OVS will meet the statutory requirements. The market will determine whether it succeeds.
- Thus, the Commission's role is not that of a cheerleader for OVS, but to ensure that it is a true open system.
- The ten-day time limit for certification approval implies, not that FCC approval must be a meaningless rubber stamp, but that LECs must do their homework first, so that the FCC can do its job quickly.
- No LEC will rush into an investment of this magnitude without extensive prior preparation. There is no reason the LECs cannot use this same pre-certification period to prepare a fully informative application (including, for example, the necessary local consents).

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- Our approach places the burden of preparing the necessary information on those who have, not only the information, but also the greatest incentive for speed: the LECs.
- The LECs' reliance on the supposed failure of VDT is misplaced.
 - VDT was constrained by the cross-ownership ban. That was the major problem.
 - LECs prefer the cable model, as they have acknowledged. VDT was a square peg in a round hole.
 - The LECs evidently decided to wait for a better deal from Congress or the courts.

II. THE COMMISSION MUST ADOPT STRONG NONDISCRIMINATION RULES.

- The LECs have admitted they will discriminate if they can, to make OVS resemble a wholly-controlled cable system.
- Thus, the FCC can give no credence to the LECs' pleas that potential discrimination problems are merely "hypothetical." Reply comments of NYNEX at 9; USTA at 4. LECs have openly admitted their desire to keep independents off OVS if they are allowed to do so.
- The overall approach of Bell Atlantic et al. is to avoid any notion of intra-system competition among programmers. Rather, the LECs appear to view OVS as a cozy niche dominated by the OVS operator for its own benefit and that of a few close allies. Reply Comments of Bell Atlantic et al. at 6.
- LECs continue to confuse three different markets: (1) the market for *carriage*, which is where the nondiscrimination and reasonable rate rules apply; (2) the market for *programming resale*, which is comparable to the existing cable operators' dealings with its programmers; and (3) the *subscriber* market. See, e.g., Reply Comments of Bell Atlantic et al. at 16-17; NYNEX Reply Comments at 8-9; USTA reply comments at 6-7. Competition in (2) or (3) will *not* create competition in (1), where the OVS operator stands alone.
- The LECs oppose "Title II-like regulation."
 - Congress directed (a) that Title II does not apply directly, and (b) that the FCC cannot simply import or cross-reference its Title II regulations in OVS.
 - But this cannot prevent the FCC from drawing on Title II-like concepts, such as nondiscrimination and reasonable rates, *as necessary* to implement the statute.
 - If Congress had wished to exclude such concepts altogether, Congress would not have used them in the statute, as it did, to define an open video system.
- **Public disclosure of contracts** is the only practical way for an independent video programming provider to know it is being discriminated against.

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- Making the contracts available through discovery is not sufficient. Such a scheme makes it too easy for LECs to impose a stiff entry barrier to independents, in the form of costly litigation needed even to find out if there is discrimination.
- **Rates** must be set on a uniform basis, pending justification of any differences by the OVS operator.
 - U S West claims that we wish to impose tariffs. Reply comments at 7 & n.20. This is untrue.
 - Rather, the challenge is to craft rules that work as well as tariffs to ensure reasonable and nondiscriminatory rates, while using as little tariff-like machinery as possible.
 - The key steps in such rules must be
 - (1) presumption that rates must be equal absent a full explanation, and
 - (2) public disclosure.
 - Our comments at 21 n.27 distinguish such an approach from tariffing.
 - Bell Atlantic et al. want to charge different rates based on the market value of the *programming* offered. Reply Comments of Bell Atlantic et al. at 18. In other words, the LEC would not only make a profit on the carriage, but also capture the programmers' profits on the quality of their programming.
 - NYNEX complains about potential discrimination by programmers. Reply comments at 14-15. This is inconsistent with NYNEX's demand to be allowed to discriminate itself as an OVS operator, and illustrates the self-interested motive of LECs' one-sided demands for "flexibility."

III. OVS SHOULD MEET PEG REQUIREMENTS THROUGH A "MATCH OR NEGOTIATE" REQUIREMENT.

- LECs wish to be able to provide "equivalent" PEG carriage in different ways. Reply Comments of Bell Atlantic et al. at 26-27; USTA reply comments at 6. This is why we advocate making available the "negotiate" option.
- Bell Atlantic et al. claim that such negotiation would reimpose the franchise requirements of § 621(a)(4)(B). This is untrue, because an OVS operator that wishes to avoid negotiations can always match the incumbent cable operator.
- The two options together allow for appropriate "flexibility." However, the LECs favor such flexibility only when it is to their advantage.

IV. CABLE OPERATORS SHOULD NOT BE PERMITTED TO BECOME OVS OPERATORS, BUT IF THEY ARE, SEPARATE AND PRIOR LOCAL APPROVAL WILL BE NECESSARY.

- Nothing in the Act authorizes cable operators to abrogate their contracts with local communities.
- Thus, local community approval would be necessary for any conversion of a cable system into an OVS.

V. THE CERTIFICATION PROCESS MUST ENSURE THAT AN OVS COMPLIES WITH LOCAL RIGHTS REGARDING THE PUBLIC RIGHTS-OF-WAY.

- Legal arguments regarding the takings issue are addressed in a separate memorandum.
- To prevent involvement of the FCC in Fifth Amendment litigation, any OVS approval must specifically condition such approval on obtaining and maintaining the necessary consents.
- Bell Atlantic et al. appear to argue that certification cannot include such factors as right-of-way authorization. Reply Comments of Bell Atlantic et al. at 25, 29 n.72. This is incorrect.
 - The certification language in the statute is not exclusive. It does not prevent the FCC from requiring the information necessary to ensure that the statutory objectives are fulfilled.
 - Bell Atlantic et al. claim that the certification can cover § 653(b) requirements, but not 653(c). Reply Comments of Bell Atlantic et al. at 25, 27. But § 653(c)(2)(A) makes clear that the FCC implements the 653(c) requirements *in* the § 653(b)(1) rulemaking. Thus, the LECs' proposed distinction cannot hold: the requirements of subsection (c) are subsumed in those of (b).

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(CS Docket No. 96-46)

May 14, 1996

National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida

I. MAKING OVS WORK: PROPOSED REGULATIONS

- Open Access
 - Ensure access to capacity for independent video programming providers: *Proposed Rules, § 8*
 - Ensure reasonable and nondiscriminatory terms and conditions: *Proposed Rules, § 9*
 - Ensure reasonable and nondiscriminatory rates: *Proposed Rules, § 10*
- Certification Process
 - Adequate preparation by applicant to enable expedited FCC review: *Proposed Rules, § 4(b)*
 - Public notice and comment: *Proposed Rules, §§ 4(a)(2), 5*

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- **Enforcement of FCC Regulations**
 - Annual report to enable detection of potential violations: *Proposed Rules*, § 6
 - FCC investigation: *Proposed Rules*, § 14(a)-(c)
 - Remedies: decertification, fines or forfeitures: *Proposed Rules*, § 14(d)
 - Dispute resolution process for carriage complaints: *Proposed Rules*, § 15
- **PEG Access Requirements**
 - OVS operator options: "Match or negotiate": *Proposed Rules*, §§ 4(b)(4), 12(b)(2), 12(d)
 - Types of PEG obligations: channel capacity, services, facilities, and equipment. *Proposed Rules*, § 12(a), (d)
 - Tracking community needs and interests: *Proposed Rules*, § 12(a)-(e)
- **Fee In Lieu of Franchise Fee: *Proposed Rules*, § 11**
- **Cable/OVS Relationship**
 - Cable operator as OVS operator: *Proposed Rules*, § 3(b)
 - Cable operator as independent video programming provider: *Proposed Rules*, § 8(f)
- **Right-of-Way Issues**
 - Effect of Commission approval of certification: *Proposed Rules*, §§ 4(b)(3), 5(e)(2)
 - State and local law governs disputes over right-of-way authority. *Proposed Rules*, § 15(a)(2), (b)(2)

II. LECS WILL SET CARRIAGE RATES TO EXCLUDE INDEPENDENT PROGRAMMING PROVIDERS UNLESS THE COMMISSION'S RULES ENSURE THAT RATES ARE REASONABLE

- The LECs have admitted they will discriminate if they can, to make OVS resemble a closed cable system.
 - The LECs oppose *any* formula to evaluate the reasonableness of carriage rates. *See, e.g.,* Joint Parties' May 2, 1996, Letter to Cable Bureau at 1.
 - The LECs also oppose result-based criteria to determine whether their carriage rates actually permit independent video programming providers to use the ostensibly open system, such as the "yardstick" test proposed in *Comments of the National League of Cities et al.* at 20 (April 1, 1996).
- Instead, the LECs seek additional rules to place burdens on independent VPPs and to protect OVS operators.
 - The LECs advocate a "safe harbor" in which rates are *conclusively* presumed reasonable. *See* Joint Parties' May 2, 1996, Letter to Cable Bureau at 2.
 - Presence of a single unaffiliated video programming provider ("VPP") is woefully insufficient to ensure that rates are reasonable. An OVS operator could enter into a "sweetheart deal" or tradeoff arrangement with a friendly unaffiliated VPP so as to exclude all other unaffiliated VPPs — particularly if "unaffiliated" VPPs are permitted to have relationships other than a carrier-user relationship. For example, U S West and Continental could agree to serve reciprocally as each others' single "unaffiliated" VPP in their respective markets.
 - Thus, an OVS operator could readily reach an arrangement with its single unaffiliated VPP allowing rates too high for true independent VPPs to afford, through a "back-door" deal that would reduce the true cost to the favored VPP. Such an arrangement would be even easier to conceal if, as the LECs request, the OVS operator need merely charge affiliated and unaffiliated VPPs prices that are "equivalent" (not equal) for carriage of *similar* programming under *similar* circumstances — criteria so loose that the OVS operator could claim they would be

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met by almost any rates. See Joint Parties' May 2, 1996, Letter to Cable Bureau at 2.

- The LECs suggest that OVS operators should be able to use *unpublished* rate cards to expand this safe harbor and further discourage complaints. Joint Parties' May 2, 1996, Letter to Cable Bureau at 2-3.
 - The LECs offer no rationale why carriage rates to favored VPPs would become more reasonable — much less why they should be *conclusively* presumed reasonable — if the LEC had the rates engraved on unpublished rate cards.
 - If, as the LECs argue, contracts at rates different from those on the rate cards would also be presumed reasonable, it is difficult to see how such a rate card could help "ensure that the rates, terms, and conditions for such carriage are just and reasonable." 1996 Act § 302(a) (adding new § 653(b)(1)(A)).
- The LECs would place the burden on an independent VPP to provide evidence of discrimination, even though the necessary information is in the possession of the OVS operator
 - The LECs' rules would require an independent VPP to allege in its complaint with particularity, and with substantial evidence, that the operator *intentionally* treated it *substantially* differently from other *similarly situated* VPPs; that such treatment was commercially unreasonable; and that such treatment caused the complainant actual and substantial harm (§ 10(c)(1), (f)(1)(G)-(I)).
 - Yet the only way an independent VPP could acquire such evidence under the LECs' rules would be through an FCC discovery order — which would not be issued until *after* such a complaint were filed and met the LECs' stringent pleading standards (§ 10(j)).
 - Even if an independent VPP could obtain an unpublished rate card, such a card would show only one possible rate, and would not allow an independent VPP to determine whether other VPPs had received more favorable rates, terms, or conditions. Joint Parties' May 2, 1996, Letter to Cable Bureau at 2-3.

- Thus, the LECs' dispute resolution procedure is designed to hinder and prevent independent VPPs from bringing complaints — despite the fact that the LECs would have the Commission avoid all specific rules or tests and depend solely upon this one-sided procedure to ensure just and reasonable carriage rates.

III. THE LECS SEEK TO INDUCE THE COMMISSION TO INTERFERE WITH STATE LAW SO AS TO EFFECT A TAKING.

- Under the LECs' proposed rules, the Commission would claim to authorize use of local public rights-of-way regardless of any limitations on the scope of any existing authority a LEC may have. Joint Parties' May 2, 1996, Letter to Cable Bureau at 3.
- The scope of any grant of authority to use the public rights-of-way is determined by state and local law and the specific language of such grants. Any ambiguity in such a grant is to be construed in favor of the grantor and against the grantee. *See, e.g.*, 37 C.J.S. § 21(b), p. 167 (1995), citing *inter alia Broad River Power Co. v. State of South Carolina ex rel. Daniel*, 281 U.S. 537, 50 S. Ct. 401, 404, *aff'd on reh'g*, 282 U.S. 187, 51 S. Ct. 94 (1930).
- Adoption of the LECs' proposed rule to preempt such grants would represent a Fifth Amendment taking, paid for by federal taxpayers rather than by the LECs.
- Congress did not authorize such a taking, nor provide for compensation for the market value of such property. The LECs' proposed approach would unnecessarily delay the introduction and market test of OVS by provoking constitutional litigation.
- The OVS regulatory scheme releases OVS operators from numerous federal regulations. If this incentive is not sufficient to induce LECs to choose OVS over cable (as the LECs suggest, Joint Parties' May 2, 1996, Letter to Cable Bureau at 3), the LECs are free to become cable operators instead.